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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

January Term, 1975

No. 74-860

JAMES BURTCHETT,

Petitioner,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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SUBJECT INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provisions Involved 2

Statement of Facts 2, 3, 4

Reasons for Granting Writ 4, 5, 6, 7, 8, 9

Conclusion 9

APPENDIX A -
Motion to Dismiss Amended Information 11, 12

APPENDIX B -
Appeal to Supreme Court from District Court of the Twelfth Judicial District 12, 13, 14, 15, 16, 17, 18, 19

APPENDIX C -
Petition for Rehearing 19, 20, 21, 22, 23, 24

APPENDIX D -
Order Denying Rehearing 25

APPENDIX E -
Excerpts of Yeager's Testimony 26, 27, 28, 29

INDEX -- (Continued)

TABLE OF AUTHORITIES CITED

CASES

PAGE

U. S. SUPREME COURT

Dickey v. Florida
398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 '(1970) 8

United States v. Ewell
383 U.S. 116, 122, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966) 5

United States v. Marion
404 U.S. 307, 92 S.Ct. 455,
30 L.Ed. 468 (1971) 4, 5, 6, 7, 9, 15

CIRCUIT COURT OF APPEALS

United States v. Beitscher
467 F.2d 269, (10th Cir. 1972) 7

United States v. Daley
454 F.2d 505, (1st Cir. 1972) 5, 7

United States v. Detienne
468 F.2d 151, (7th Cir. 1972) 5, 7

United States v. Dukow
453 F.2d 1328, (3rd Cir. 1972) 6

United States v. Edwards
458 F.2d 875, (5th Cir. 1972) 5, 6

United States v. Emory
468 F.2d 1017, (8th Cir. 1972) 6

United States v. Griffin
464 F.2d 1352, (9th Cir. 1972) 6

INDEX -- (Continued)

TABLE OF AUTHORITIES CITED

CASES

PAGE

United States v. Hauff
461 F.2d 1061 (7th Cir. 1972) 6

United States v. Iannelli
461F.2d at 485 n. 2 (2d Cir. 1972) 6

United States v. Lee
458 F.2d 32, (9th Cir. 1972) 7

United States v. Merrick
464 F.2d 1087, (10th Cir. 1972 7

United States v. Stein
456 F.2d 844, (2d Cir. 1972) 5, 6

United States v. White
470 F.2d 170, (7th Cir. 1972) 6

Nickens v. United States
323 F.2d 808 (D.C. Cir. 1963) 5

FEDERAL

United States v. Mones
336 F.Supp. 1322, 1324 (S.D. Fla. 1972) 6

United States v. Parrott
248 F.Supp. 196, 203 (D.D.C. 1965) 7

United States v. Robertson
55 F.R.D. at 15 (D.D.C. 1972) 6

INDEX -- (Continued)

TABLE OF AUTHORITIES CITED

CASES

PAGE

STATE

Dufrane v. Sheriff Sashoe County
__ Nev. ____, 495 P.2d 611, 614 (1972) 6

Marks v. State
496 P.2d 66, 68 - 69 (Alas. 1972) 8

P. H. v. State
504 P.2d 837, 847 (Alas. 1972) 8

TEXUAL

Schneider, The Right to a Speedy Trial
20 Stan. L. Rev. 476, 489 (1967 - 68) 5

CONSTITUTION

Constitution of the United States,
5th and 14th Amendments 2, 3, 4, 5, 7, 11, 24

NO. .....

IN THE

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January Term, 1975

JAMES BURTCHETT,

Petitioner,

- vs -

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioner, Burtchett, prays that certiorari issue to review the judgment of the Montana Supreme Court affirming his conviction and sentence by the Trial Court.

OPINION BELOW

The opinion of the Montana Supreme Court for which review is requested is reported at _____ P 2d _____, and set out at Appendix No. B hereof.

Petition for rehearing was denied October 21st, 1974. (App. No. D).

JURISDICTION

Jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code.

QUESTION PRESENTED

Whether the facts, events and circumstances occurring during a 15 month delay prior to filing information, prejudiced Burtchett in the preparation and presentation of his defense.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, United States Constitution, provides in part:

> " . . . No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment, United States Constitution, provides in part:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF FACTS

Petitioner, Burtchett, was charged with and convicted of (1) arson and (2) arson with intent to defraud his insurer, committed May 14, 1971.

The charges were based principally on an investigation by one Habeger, Havre City fireman and deputy state fire marshall who, one week after the fire, took samples of the first floor from seven areas, placed them in two cans and, on May 24, 1971, sent them to the U. S. Treasury Forensic Laboratory for testing to determine whether or not accelerants were present. (A government chemist testified he drew vapors from the cans showing the presence of elements common to gasoline or naptha.)

In the latter part of June, 1971, the laboratory mailed a report to Habeger stating that both samples showed the presence of elements common to gasoline or naptha.

The report laid in Habeger's office until the latter part of

September, 1972, 15 months, when Habeger discovered it and submitted it along with other findings to the County Attorney who filed charges November, 1972.

The burned premises remained as is until May 1972, when, after insurance settlement in March, 1972, and after determining the property not repairable, Burtchett salvaged what he could, and burned the unsalvageable remains with consent and knowledge of the County fire chief, and the Havre City fire chief. The latter was Habeger's superior and knew that the fire was deemed suspicious and knew samples had been sent to the Forensic Laboratory.

Motion to dismiss for prejudicial preinformation delay under the Fifth, Sixth and Fourteenth Amendments, (Appendix No. 'A') was heard pre-trial and denied on the ground that prejudice was not shown. The motion was renewed at the close of the State's case, and renewed again at the close of evidence.

Testimony in connection with the motion established that, in the course of thawing frozen pipes during winter months, a great deal of heavy, sooty smoke from firing kerosene, distillate and gasoline in a heater under the house had impregnated the underflooring of the rooms, where the fire occurred, with petroliferous compounds. Also, that linoleum flooring had been laid down with an asphalt base adhesive, and that the adhesive had impregnated and become fixed to the wood flooring.

Testimony was that the fire burned with intense heat.

Yeager, a college teaching chemist, testified for Burtchett. The government laboratory report showed that hexane was present in the samples submitted by Habeger. Yeager testified that in such heat he would expect hexane to be evaporated and not be present in any samples taken by Habeger.

The substance of Yeager's testimony was that, in view of the impregnation of the flooring, he could subject samples of any part of the impregnated area to heat similar to the fire and chromatographic tests would show the same elements enumerated by the government chemist. The substance of the government chemists' testimony was that Yeager could not because the conditions were different. Much of the government's contradiction was based on time element and

temperature, it being stated that the elements reported in the samples would not be detectable after a week or more. The fire was May 14, the samples were taken May 21st.

The critical testimony of Yeager is at Appendix E.

Motion was made to exclude the canned samples on ground of taint by commingling.

Habeger testified he took seven floor samples from the ground floor area. His testimony varied in that anywhere from one to three samples went into the first can, and from four to six samples went into the second can. His stated purpose in taking the samples was to show the floor at each sample area contained accelerants. His further testimony on the motion was that the first can contained samples from the point of origin in the area of a floor furnace. During trial, his testimony was that the seven samples showed seven points of origin.

On the hearing on the motion to exclude, had prior to trial, the Court denied the motion. After trial foundation, the Court admitted the first sample can, but exluded the second can. The first can was admitted on the basis it was shown that all its samples came from the point of origin of the fire; the second excluded on the grounds that the samples were tainted by commingling.

On the motion to dismiss for prejudicial delay, renewed at close of the State's case, and again at close of evidence, it was argued, in addition to the chemist's testimony, that by loss of the premises, Burtchett had no opportunity to test the inconsistent testimony of Habeger in relation to his sampling of the floor areas.

The Montana Supreme Court ignored this contention in its opinion.

On appeal, the Montana Supreme Court, in affirmance ruled no actual prejudice was shown. Petition for rehearing was denied October 21, 1974. (App. D)

REASONS FOR GRANTING WRIT

The Due Process Clause of the Fifth Amendment by this Court's decision in *United States vs. Marion*, 404 U. S. 307, 92 S.Ct. 455, 30 L.Ed. 468 (1971), protects defendants' rights in criminal cases with respect to events occurring prior to information, which events may so prejudice a defendant as to require dismissal of the prosecution.

By the Fourteenth Amendment, the rule of *Marion* applies to the States.

This Court has not yet reported a record factual situation for the purpose of determining whether or not such situation occurring during preinformation delay is prejudicial to defendant's defense.

The reasoning behind the application of the Fifth Amendment to the pre-information state delays was explained by Mr. Justice Douglas in his concurring opinion in *Marion*.

> Those delays may result in a loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the state may proceed methodically to build its case while the prospective defendant loses his. 404 U. S. at 331, 92 S.Ct. at 469, 30 L.Ed.2d at 485 (1971). *Cf. Nickens v. United States*, 323 F.2d 808, 818 (D.C. Cir. 1963) (Wright J. concurring opinion); Schneider, *The Right to a Speedy Trial*, 20 *Stan. L. Rev.* 476, 489 (1967-68)

Due to the application of the Fifth Amendment due process protections to pre-accusation delays, a qualification of the federal and state governments' rights to bring a criminal charge within the applicable statute of limitations has occurred. "(I)t is appropriate to note here that the statute of limitations does not fully define . . . (a defendants') rights with respect to events occurring prior to indictment." *Marion*, 404 U.S. at 324, 92 S.Ct. at 465, 30 L.Ed.2d at 480-81 (1971). The Fifth Amendment protection is an additional safeguard. The applicable statute of limitations will be controlling absent a defendants' establishment of prejudicial delay violative of the Fifth Amendment. *United States v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972); *United States v. Stein*, 456 F.2d 844, 848, (2d Cir. 1972, *cert. denied* 408 U. S. 922 (1972); *United States v. Edwards*, 458 F.2d 875, 882 (5th Cir. 1972); *United States v. Detienne*, 468 F.2d 151, 156 (7th Cir. 1972) *cf. United States v. Ewell*, 383 U. S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627, 632 (1966).

This Court in *Marion* did not determine under what conditions "actual prejudice" would require dismissal of a prosecution. 404 U.S. at 324, 92 S.Ct. at 465, 30 L.Ed.2d at 481 (1971). The court made the issue more complex by more dicta later in the opinion which cast

doubt on whether or not just "actual prejudice" was required for dismissal regardless of the circumstances:

> No actual prejudice to the conduct of the defense is alleged or proven, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them . . . Events of the trial may demonstrate actual prejudice but at the present time appellees' due process claims are speculative and premature. 404 U. S. at 326, 92 S.Ct. at 466, 30 L.Ed.2d at 481-82 (1971).

At least one lower federal court has recognized this issue and questioned "whether a successful claim under the due process clause must establish both actual prejudice and intentional delay on the part of the Government or whether the former alone would be sufficient." *United States v. Iannelli*, 461 F.2d at 485 n. 2 (2d Cir. 1972). Other courts have seemingly skirted the issue. *See, United States v. Robertson*, 55 F.R.D. at 15 (D.D.C. 1972). In any event, the position taken by the Supreme Court has left this issue open for interpretation by the lower courts. It is subsequent lower court interpretation which has resulted in the existence of two tests.

From reading the cases, "actual prejudice" includes prejudice resulting merely from the delay *or* as a result of a purposefully oppressive delay. Both delays are "actual" in terms of prejudice. The term "substantial prejudice" is used mainly as an early recognition that more than a mere trifle of delay is necessary to constitute a Fifth Amendment violation. For the most part "substantial" appears to be an undefined increment of "actual prejudice" with the real requirement remaining the singular proof of actual prejudice. *See, United States v. Stein*, 456 F.2d 844, 848 (2d Cir. 1972); *United States v. Iannelli*, 461 F.2d 483, 485 (2d Cir. 1972); *United States v. Dukow*, 453 F.2d 1328, 1330 (3rd Cir. 1972); *United States v. Edwards*, 458 F.2d 875, 882 (5th Cir. 1972); *United States v. Hauff*, 461 F.2d 1061, 1065 (7th Cir. 1972); *United States v. White*, 470 F.2d 170, 175 (7th Cir. 1972); *United States v. Emory*, 468 F.2d 1017, 1019 (8th Cir. 1972); *United States v. Griffin*, 464 F.2d 1352, 1355 (9th Cir. 1972); *United States v. Mones*, 336 F. Supp. 1322, 1324 (S.D. Fla. 1972); *Dufrane v. Sheriff Washoe County*, Nev. , 495 P.2d 611,

(1972); *Cf. United States v. Parrott*, 248 F.Supp. 196, 203 (D.D.C. 1965).

Several of these same courts in post-*Marion* cases have interpreted the Supreme Court as requiring that both prejudice and intentional delay be proven in order for a Fifth Amendment question to arise. A typical statement of this view was recently made by the Seventh Circuit in *United States v. Detienne*, 468 F.2d 151 (7th Cir. 1972).

> (A)ppellants have not shown that the preindictment delay in this case caused substantial prejudice to their rights to a fair trial and that the delay was an intentional device to gain technical (sic) advantage over the accused. Therefore, the due process clause of the Fifth Amendment also does not require dismissal of the indictment. 468 F.2d at 156 (1972). *Accord, United States v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972); *United States v. Merrick*, 464 F.2d 1087, 1090 (10th Cir. 1972); *United States v. Beitscher*, 467 F.2d 269, 272 (10th Cir. 1972); *United States v. Lee*, 458 F.2d 32, 33 (9th Cir. 1972) per curiam.

In summary the Second, Third, Fifth and Eighth Circuits require only the proof of actual prejudice, the First and Tenth Circuits require the proof of actual and intentional prejudice. The Seventh and Ninth Circuits have within the year 1972 stated both views. The only possible conclusion to be drawn from these facts is that the lower courts are uncertain as to the scope of *Marion* and are proceeding on a case to case basis with verbal deference to a test which fits the facts of each particular case.

Since delays frequently occur between an alleged criminal act and the filing of an information it is essential to determine under what conditions and circumstances delay becomes prejudicial to a defendant's defense as to be considered violative of the Fifth Amendment. This court left such consideration open, stating in *Marion* that:

> We need not and could not now determine when and in what circumstances actual prejudice requires the dismissal of prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution . . . (T)he rights of defendant to a fair trial will necessarily involve a delicate

> judgment based on the circumstances of each case. 404 U. S. at 324-25, 92 S.Ct. at 465-66, 30 L.Ed.2d at 481 (1971).

The general considerations have thus also been left for development by lower courts.

Prior to *Marion* Mr. Justice Brennan in his concurring opinion in *Dickey v. Florida*, U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970) considered the issue of governmental delay with respect defendant's speedy trial rights.

> Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have avoided - whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and on the other, the length of the delay and its potential for prejudice to interests protected . . . . 398 U. S. at 52, 90 S.Ct. at 1576, 26 L.Ed.2d at 40 (dictum) (1970).

The Supreme Court of Alaska has expressed a nearly identical view with respect to pre-accusation delays. "The reason for the delay, the prejudice to the defendant, and the governmental interest in postponing accusation must be evaluated to assess a claim of violation of due process with respect to events occurring prior to indictment." *P.H. v. State*, 504 P.2d 837, 847 (Alas. 1972); *accord*, *Marks v. State*, 496 P.2d 66, 68-69 (Alas. 1972).

Analogous cases only have been examined since, unfortunately, there are no other cases which share the fact situation and due process claim presented here in Burtchett. They have not been factually explained since they were so different from Burtchett that explanation would be of little value.

The Montana Supreme Court ignored the trial court's findings of a negligent delay, seeming to excuse it on the basis of unfortunate happenstance. Thus, it cannot be determined from the Montana court's opinion whether or not it is requiring an intentional delay as an element of "actual prejudice".

The Montana Supreme Court recognized the materiality of the State's examination and testing of the destroyed evidence in the prosecution of the State's case. However, it says, in effect, such loss did not hinder Burtchett in preparing and presenting his defense.

It is inherently difficult for Burtchett to, on the one hand claim

prejudice to his defense due to the unavailability of the remains for testing, while on the other hand, having to prove what the missing evidence would be in order to have his loss considered prejudicial. The burned remains had to be tested to yield evidence and without the testing steps, which were available to the State, and are forever lost to Burtchett, he cannot by alternative means present the information contained therein which would favore his defense.

Memory, regardless of it's accuracy, cannot duplicate the information which tests on the remains may have shown. Composition of flooring materials may be recalled and the use of the heater, but it inherently cannot be recalled how those materials reacted to the heat since that requires testing.

CONCLUSION

The writ should issue because:

Circumstances and events occurring during the delay prior to filing information prejudiced Burtchett's ability to prepare and present his defense in violation of the due process clause, requiring dismissal of the charges.

In view of the divergences of the lower courts as to the requirements of *Marion*, the court

(1) can establish some guidelines as to what constitutes "actual prejudice", and

(2) can establish under what conditions (intentional, negligent or unintentional) "actual prejudice" requires dismissal of a prosecution,

(3) under the Fifth Amendment.

Respectfully submitted,
MORRISON, ETTIEN & BARRON

By _____
Counsel for Petitioner

(APPENDICES A, B, C, D, E FOLLOW)

APPENDICES

APPENDIX A

IN THE DISTRICT COURT
OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF HILL

THE STATE OF MONTANA,
Plaintiff,

vs.

MOTION TO DISMISS
AMENDED
INFORMATION

JAMES BURTCHETT,
Defendant.

Defendant moves to dismiss the amended information be dismissed on the following grounds:

1. That Defendant has been denied the right to a speedy trial and the delay caused in bringing the charges has impaired his ability to defend himself, all in violation of the Fifth and Sixth Amendments of the United States Constitution, and Article III, Sections 16 and 27 of the Montana Constitution.

2. This motion is made and based on affidavits filed in support hereof, and on oral and documentary testimony to be introduced at hearing hereon.

Defendant further moves that a time and place be fixed for hearing on this motion.

DATED January 26, 1973

MORRISON, ETTIEN & BARRON
By J. CHAN ETTIEN
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221 Third Avenue
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Havre, Montana 59501
ATTORNEYS FOR DEFENDANT

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing MOTION TO DISMISS AMENDED INFORMATION and receipt of a copy thereof and copies of Mayer, Ettien and Yeager affidavits is hereby acknowledged this _____ day of January, 1973.

APPENDIX B

NO. 12572

IN THE SUPREME COURT
OF THE STATE OF MONTANA

1974

STATE OF MONTANA,

Plaintiff and Respondent,

- vs -

JAMES BURCHETT,

Defendant and Appellant.

Appeal from: District Court of the Twelfth Judicial District, Honorable B. W. Thomas, Judge presiding.

Counsel of Record:

For Appellant:

Morrison, Ettien and Barron, Havre, Montana
J. Chan Ettien argued, Havre, Montana

For Respondent:

Hon. Robert L. Woodahl, Attorney General, Helena, Montana
J. Michael Yeung, Assistant Attorney General, argued, Helena, Montana
Ronald W. Smith, County Attorney, argued, Havre, Montana

Submitted: June 12, 1974
Decided: Sept 13, 1974

Filed: Sept 13, 1974
THOMAS J. KEARNEY
Clerk

Honorable Robert Keller, District Judge, sitting in place of Mr. Chief Justice James T. Harrison, delivered the Opinion of the Court.

Appellant, defendant below, was convicted of the crime of arson in the first degree and arson with intent to defraud an insurer, buy jury, in the district court of the twelfth judicial district of the State of Montana, in and for the County of Hill, before the Honorable Bernard W. Thomas.

Appellant's residence, located six miles south of Havre, Montana, was substantially destroyed by fire on the night of May 14, 1971. The Havre city fire marshal, Richard D. Habeger, who was also a special deputy state fire marshal, inspected the premises on May 15, 1971, took several pictures, but was unable to make a determination as to the cause of the fire. The State Fire Marshals Office, at the instigation of the appellant's fire insurance company, called Habeger and requested that he go back to the premises for a more detailed inspection. Habeger returned on May 21, 1971, took 15 or 20 photographs and collected samples from seven different holes burned in the floor. Samples from one of the burned holes, adjacent to the floor furnace, were placed in a two pound coffee can, ultimately admitted into evidence as exhibit D; samples from six other holes,

further removed from the floor furnace, were placed into another two pound coffee can, and ultimately marked as exhibit E, but refused admission into evidence at the trial. Habeger mailed both exhibits to the alcohol, tobacco and firearms laboratory in Washington, D.C., for examination and report on May 24, 1971. He did not receive an immediate reply.

In August, 1971, appellant encountered Habeger at the Hill County Fair and asked if there had been any results from the investigation. Habeger replied in the negative. In March, 1972, appellant settled his claim with his insurance company, decided to tear down what was left of the residence, and then rebuild. Finding no one to tear down the building, appellant decided to burn down the remainder of the building. He cleared the burning with the City of Havre fire department and with Hill County, but not specifically with Habeger, and in late May 1972, burned down the remainder of the building.

The samples had been received by the alcohol, tobacco and firearms laboratory in Washington, D.C., tested on June 16, 1971, and the results, showing the presence of accelerants, mailed back to Habeger. Unfortunately, at the time the results were returned, the Havre city fire department was moving its residence and Habeger was on vacation. The letter with the results was deposited with some junk mail in a cubbyhole in a desk in the new firehall where it lay unnoticed until late September, 1972, some 15 months later, when Habeger was looking for some material for Fire Prevention Week. He immediately turned all the results of this investigation over to the county attorney for Hill County and this prosecution followed.

Appellant's contentions are as follows:

1. That the court erred in refusing to dismiss the charges on the grounds of prejudicial delay;

2. That the court erred in admitting Exhibit D;

3. That the court erred in admitting the evidence from the forensic laboratory.

Addressing appellant's first contention, there is no question but that a delay in time between the commission of an offense and the commencement of the prosecution, by the filing of an information

termed "preindictment delay" can be the denial of due process. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468. Mere delay, in and of itself, is not sufficient. There must be either actual prejudice to the conduct of the defense, or that the State intentionally delayed to gain some tactical advantage over appellant, or to harass him. United States v. Marion, supra.

In the instant case, appellant concedes in his brief that mere delay is not prejudicial in itself and that the delay in this instance was neither intentional nor purposeful. He does contend, however, that by the time he was put on noticed he was the subject of criminal action, the physical evidence had been destroyed, and he was substantially prejudiced thereby.

At a pretrial suppression hearing and at the trial, appellant called as a witness a chemist from Northern Montana College who testified that by the use of a gas chromatograph he could determine whether or not samples from other portions of the floor contained the same components that chemists in the alcohol, tobacco and firearms laboratory in Washington, D.C., found in the sample taken from the holes that had burned through the floor of the house. Evidence had been introduced by appellant that a considerable amount of kerosene smoke had been permitted to collect on the underside of the floor (from thawing frozen pipes in the cellar on a number of occasions), and that there was inlaid linoleum on the floor of the house, held in place by either asphalt or some other petroleum-based compound. Appellant's chemist testified that either, or both of these conditions could have given rise to a finding by the State's chemist that there were accelerants present. He would have ground up samples from the floor, placed them in an oven under heat, and analyzed the gases.

The chemist from the alcohol, tobacco and firearms laboratory used gas chromatography but with a different approach. When the samples were first collected by the deputy state fire marshal and placed in coffee cans, plastic lids were placed over the cans and then taped into place. When the government chemists received these cans they inserted a syringe through the plastic lids into the can, withdrew the vapors then existent, and used the gas chromatograph upon the vapors. They found gasoline or naptha present in both cans. These

were defined as accelerants, highly volatile, and with an exceptionally low flash point. They further testified that if a volatile petroleum distillate had been placed upon wood, and then stored in the open, it would not only gradually evaporate, but after a period of several months, there was no reliable technique known to detect and identify the petroleum distillate. In addition, they testified that the sooty residue from the kerosene burn and the asphalt used to set the linoleum were not volatile petroleum distillates.

In other words, the report from the government chemist was received in Havre about the end of June, 1971, more than a month following the fire. All that a chemist of the appellant could have found at that date was that he could find no presence of accelerants, which would be expected.

On the other hand, the samples examined by the government chemist, offered as State's exhibits D and E, were still intact, still sealed, and still capable of examination. For reasons not shown in the record, appellant never asked that his chemist be permitted to examine those to show that the government chemists were in error, if they were. In other words, the only evidence available to the chemists for the state was still available for the chemists for the appellant.

The trial court was correct in holding that there was no actual prejudice to the appellant occasioned by the preindictment delay.

Appellant's second contention is that the court erred in admitting exhibit D, one of the coffee cans containing samples from one of the holes burned through the floor. The contention is without merit, both factually and legally.

Deputy state fire marshal Habeger testified that he took all of the samples from each of seven holes, that he put two or three samples from the first hole in one can (exhibit D) and then he put the remaining samples in the second can (State's proposed exhibit E). He made a sketch of the premises and on the sketch indicated where each of the seven holes was. The first hole was near the floor furnace and upon Habeger's sketch he indicated "point of origin". Hole number one was never established as the "point of origin" by any proof; in fact, Habeger testified that he believed all seven holes to be simultaneous points of origin. Appellant's counsel continued to refer

to hole number one as the point of origin, and the transcript is clear that appellant's counsel became confused by Habeger's testimony and believed that Habeger had placed samples from the first three holes in the first can and samples from the remaining four holes in the second can. Since Habeger could not establish which holes had accelerants and which ones did not, defense counsel convinced the trial court that the samples in the second can were commingled, some coming from holes that had accelerants and some coming from holes that did not. The same argument is being used here to show that the same situation was true with the first can of samples. The trial court was not confused by the testimony and knew that the samples in the first can, exhibit D, came from only one hole, the first hole, the "point of origin" hole.

The only error committed by the trial court, and it was harmless, was in excluding State's proposed exhibit E. There should have been no accelerants in that house and the deputy state fire marshal took samples from that house and there were accelerants in both samples. What possible difference could it make, under the facts in this case, which hole had the accelerants? The State was in a position to prove that there were accelerants in at least two different places and exhibit E should have been admitted.

Appellant's third contention is that the court erred in admitting the evidence from the forensic laboratory in two particulars. Appellant's first point is that once the samples reached the forensic laboratory in Washington, D.C., there were several people who had access to the laboratory and therefore the custodial chain of evidence was not established.

The samples in question were collected by the deputy state fire marshal, packaged by him and mailed by him to the alcohol, tobacco and firearms laboratory in Washington, D.C. One of the chemists from that laboratory testified that he received the package, that it was kept in that laboratory and the security room, it was examined by one of the chemists from that laboratory who also testified and it had been kept in the evidence room at the laboratory until the two chemists brought the samples to Montana. This is all that is required for a prima facie case. The State must identify the particular exhibit as

relevant to the criminal charge and must show prima facie that no alteration or tampering with the exhibit has occurred. State v. Wong Fong, 75 Mont. 81, 241 P. 1072. Once that has been done, the burden of proving alteration shifts to appellant. State v. Fitzpatrick, __ Mont. __, 516 P.2d 605, 30 St.Rep. 1052.

Appellant additionally contends that the State failed to use the best evidence in proving the results of the gas chromatograph; that the chromatogram record itself should have been introduced and proof made of the standards utilized by the chemist in interpreting the chromatogram. The contention has merit, technical though it may be, but the complaint came far too late. The chemist who actually examined the samples testified that he readily detected accelerants by the use of the gas chromatogram and that there was a marked, distinguishable difference between these accelerants and the other nonvolatile petroleum distillates that the appellant contended were also in the floor. His testimony was lengthy and technical but that is the thrust of it. Following appellant's case in chief, the State called the second chemist from the forensic laboratory in Washington as its final rebuttal witness, the chemist who was in charge of the laboratory but who did not actually do the examination of the samples. Defense counsel realized during the cross-examination of this witness on rebuttal that he had overlooked both the chromatogram record and the standards, established that both were in existence, then moved to strike all of the testimony of both chemists on grounds that during their testimony of the State's case in chief, they had not used the best evidence in explaining the results of the gas chromatograph test. The trial judge properly overruled the objection. Neither was relevant to this particular witness's testimony for he testified as a custodian of the laboratory and was in no position to testify as to what the other chemists utilized for his testimony relative to the examination of the samples. As stated before, the objection came far too late.

For the foregoing reasons, judgment of the trial court is affirmed.

ROBERT KELLER

Hon. Robert Keller, District Judge
sitting in place of Mr. Chief
Justice James T. Harrison.

We concur.

GENE B. DALY
WESLEY CASTLES
FRANK I. HASWELL
JOHN CONWAY HARRISON
Associate Justices

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 12572

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

JAMES BURTCHETT,

Defendant and Appellant.

PETITION FOR REHEARING

Burtchett petitions the Court for rehearing for the reasons and grounds.

It appears from a reading of the Opinion, and a review of the record that certain facts, question and controlling decision, as hereafter set forth, have been overlooked by the court.

At Page 3 of the opinion, it recites that the Report from the forensic

laboratory was returned while the Havre City Fire Department was moving its residence and Habeger was on vacation.

The fire department moved the latter part of May and Hilla and Habeger's desks were ready for busines the forepart of June, before the report was mailed from Washington. (TRI, L.3-24, P.23; L.16-19, P.73).

The obvious inference is that Habeger came back from vacation, went through his mail, passing the report up as junk mail or overlooking it.

On top of that, Habeger made no effort to follow up though the insurance company adjustors were agitating him on the subject, and Burtchett had spoken to him about it in August of 1971.

It was primarily these facts by which the trial court found negligence in the delay.

At line 17, page 4 of the Opinion, the Court's recital states that only kerosene smoke and petroleum based adhesive compounds were in the flooring. In addition to these compounds, there was evidence of gasoline being used to thaw the pipes, smoke of which had an opportunity to impregnate the flooring. (TR I, L.26, P.46 to L.8, P.49)

At line 3, page 5 of the opinion, the opinion states that the government witnesses found gasoline or naptha present in both of the sample cans. A review of Midkiff's testimony shows there was no testimony, as such, that gasoline or naptha was present. The testimony was that compounds making up gasoline or naptha were present in the chromatograph test and that such compounds or elements came from the sample can.

Line 5, page 5 of the Opinion refers to the Midkiff testimony of volatile petroleum distillate being placed upon wood and stored in the open, and the recited results.

Midkiff actually testified that gasoline on wood in the open would disappear after a week or more, and after two weeks it would be essentially impossible to detect. (TR I, L.26, Page 87 to L.8, Page 88)

He admitted on cross examination that this test was in a laboratory, and not field condition, and that under conditions as appear in our record, he would have no way of knowing how evaporation would occur in our situation. (TR I, L.27, P. 92 to L.27, P. 93)

Again at line 10, page 5, of the opinion, there is omitted the evidence that there was also gasoline used which smoked up and impregnated the underflooring.

At line 15, page 5, of the opinion, the court states:

> "All that a chemist for the appellant could have found at that date was that he could find no presence of the accelerants, which would be expected."

This completely overlooks and is absolutely contrary to Yaeger's testimony as set out in appellant's brief.

Midkiff and Pro testified in essence that gasoline and naptha were accelerants, and that they found compounds and elements in the test common to these mixtures.

Yeager testified that, after the impregnated flooring was subjected to heat, he could find these same elements.

The opinion overlooks the fact that the flooring had been subjected to the intense heat of the fire in question. It follows from that Yeager would have to subject his samples to similar heat, if the flooring was available.

At line 17, page 5, of the opinion, the opinion scores the app[illegible] for not having his chemist examine the samples in the cans. As we attempted to point out in oral argument, this would prove nothing other than what the chemist found in the can originally. Appellant has never contended that the government experts did not find what they said they found in the sample cans. What we are saying is that, on the basis of the record submitted to Yeager for his expert testimony, other areas of the floor could be shown to have had impregnated in them the same elements common to gasoline and naptha, as did the existing samples taken by the State and were from thawing and adhesives. Such could have the effect of influencing the jury favorably toward defendant in its deliberations. By the loss of the flooring, we were unable to do this which was prejudical to appellant.

It is submitted that this Court has fallen into the same error as the trial court. It assumes the government experts testimony is the gospel and our chemist could not produce what he says he could.

The Court's opinion recognizes a conflict between Midkiff-Pro and Yaeger. We were entitled to the same chance of physical tests as the

State to confirm Yaeger's position, but could not because of loss of the flooring.

Appellant's plight is pointed out by the Court's following comment on the samples:

> "The State was in a position to prove that there were accelerants in at least two different places and Exhibit E should have been admitted."

Again the quote of the Court assumes the existence of naptha or gasoline, and does not speak of the elements common to gasoline or naptha as testified to by the government chemist.

If the flooring had been available, then, according to Yeager, we could have established the presence of compounds common to the accelerants in other areas of the floor than that which was tested by the State.

By destruction of the flooring appellant "was in a position" of being unable to prove the presence of compounds from smoke and adhesives which are also common to naptha and gasoline in other areas of the floor.

At line 9, page 6 of the opinion, the opinion states that hole Number 1 was never established as the "point of origin", overlooking Habeger's testimony at TR I, P.32, L.16 to P.33, L.20, as well as other points in the transcript, e.g., the quotation at the bottom of page 17, of appellant's brief.

Habeger stated that, by his sampling, he intended to establish that each of the holes contained accelerants. (See quotations commencing at the top of page 26, appellant's brief.)

Whether or not the State could have proved it's case by merely showing the existence of accelerants in the house is not the issue here. If the State attempts to prove more than necessary (overtrying) the defendant has the right to meet the offered evidence and object to its admissibility.

As to the proper foundation established in the results of the chromatograph tests as related at pages 7 and 8 of the opinion.

A review of Midkiff's testimony shows that the entire procedure used was not brought out, and Midkiff's testimony did not inkle the omission.

The opinion goes on to state that Pro "was in no position to testify

as to what" Midkiff "utilized for his testimony relative to the examination of the samples.

The opinion overlooks Pro's testimony which we quote:

> "Q. Would you explain your use of the machine?
>
> A. I bought the first machine in the Bureau. I was one of the pioneers in this work and I now have fourteen machines in my department and a number of these machines in our field laboratories. And I have sponsored this type of forensic application that is gas chromatography and scientific crime detection. This came under my supervision. Basically our forensic branch was the old research and development. We just grew into a large forensic area which now has been severed and a new research and development branch set up but these machines are well known to me.
>
> Q. Are you familiar then with the results one would get, the machines, the chromatograph?
>
> A. Yes.
>
> Q. The chromatrograph?
>
> A. The chromatogram is the resultant product from injecting a sample into the gas chromatograph.
>
> Q. And have you had any experience in observing gas chromatographs, themselves, from the machines from where samples of gasoline were sent into it?
>
> A. Yes. As a matter of fact, Charley runs three of them at one time. They are constantly being run and I see them almost every day and we have gone past the stage of the gas chromatograph. We now couple the gas chromatograph with a mass spectograph which is a highly sophisticated piece of equipment." (TR III, L. -30, P.408, L.1-2)

While the opinion calls the contention "technical", it remains that the appellant did not have the opportunity to cross examine as to the omitted laboratory procedures.

Lastly, it is submitted that the Court has overlooked the result it reached in *State ex rel Stimatz vs. District Court-and McLernan*, No. 12777, handed down June 5, 1974, one week before our own case was argued.

Stimatz involved a manslaughter felony complaint filed in justice court against a woman driver, occurring when the woman was allegedly driving while intoxicated. A continuance was obtained by the accused's attorney. Later the county attorney's office had hearing on the complaint continued without date and the matter was dormant

for a year. Thereafter, when the county attorney's office moved on the case, the justice of the peace dismissed under the Federal Sixth Amendment for lack of speedy trial. The county attorney then went to district court with an affidavit of probable cause and motion for leave to file information direct. Upon hearing, the district court denied the motion, on the ground of lack of speedy trial under the Sixth Amendment. There is no showing in the record that the accused was actually prejudiced in any way by the delay.

Without opinion, this court denied the writ requested by the county attorney, the result, in effect, affirming the district court.

The "speedy trial" cases reviewed by the writer concern only courts trying and giving judgment. A felony complaint in justice court is only for purposes of determining probable cause. Even if the justice finds no cause, the State is not foreclosed from filing for leave in district court. Thus, in respect, *Stimatz* is akin to a Fifth Amendment "delay" case.

On the basis of the supreme court file, the result can only be reationalized on the theory (1) of a 12-month delay, (2) most of which was the neglect of the State, and (3) such delay coupled with the State's negligence is inherently prejudicial, and in violation of the "speedy trial" requirement. In Burtchett we have a negligent 15-month delay.

We submit that if the facts in *Stimatz* are inherently prejudicial, then the evidence of prejudice offered by Burtchett is actual prejudice, and Burtchett is entitled to a rehearing and eventual dismissal of the charges, as were those of Mrs. Eddy.

Respectfully submitted,
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APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF MONTANA

NO. 12572

STATE OF MONTANA,

Plaintiff and Respondent,

- vs -

JAMES BURTCHETT,

Defendant and Appellant.

ORDER

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above-named cause is hereby denied.

DATED this 21st day of October, 1974.

APPENDIX E

EXCERPTS OF YEAGER'S TESTIMONY

The critical testimony of Yeager under the motions to dismiss, follows:

"Q. What was the effect of this sooty, oily smoke on the underpining of the house and floor, the subfloor?

A. The sooty smoke would of course, result from the insufficient oxygen to burn all of the fuel in the heater. And, much of the fuel then which is vaporized would be collected in the soot. This would rise, collect on the floor and then the volatiles or the nonburned material would tend to permeate into the wood and remain there.

Q. And would this be the tendency of this smoke everytime that burner was used?

A. Yes, each time that they were used there was any smoke of any amount, you would have the same thing.

Q. Now, Mr. Mayer's affidavit also indicates that the type of linoleum and from the appearance of the linoleum on the floor which it appeared very old to him, that it was so-called asphalt backed or based linoleum. Would you describe to the court, what, in days gone by, what kind of compound or asphalt compound were used in laying the linoleum?

A. Well, years ago until, oh, it's been the last fifteen (15) years, asphalt was rather common material because of its adhesive quality for back linoleum gluings to floors along with felt papers and so forth and whenever asphalt is heated to a high temperature, it tends to break down in the same process that a refinery cracks petroleum and gasoline and lower volatile fuels and in the process of breaking down in the term. there is additional or a side reaction known as reforming which commonly converts some of the materials, cracked materials into what we call aromatic low carbons and they would form in that way. In addition to that, you would also find that the asphalt, in order to soften it for easy laying to the floor for application was quite often, they used various solvents, talumane, thylene, benezines, as the solvents for the asphalt to make it easy to apply.

Q. Now, if such were the case as far as using these solvents and the asphalt adherents, where is it--strike that. Where do these various petroleum compounds which you have described, where do they go when the linoleum is laid on the floor?

A. When the linoleum is put on, this sort of seals it from the top there because of the nature of the linoleum, itself, and so the solvents can only penetrate into the wood downward from the asphalt and this of course, is what makes the adhesive quality is this penetration of the volatiles of the asphalt to the wood.

Q. Now you have read the lab report from the Alcohol Division containing various, reciting the various components of benezine, hexane, iso-octane, toluene and xylene. Based on the affidavit of Mr. Mayer, would the action which you have described from the smoking and the asphalt compound, could those show up in such a report?

A. I should think so. I don't see any reason why they shouldn't still be present.

Q. Now, you have been advised, have you not, that Mr. Burtchett destroyed the remaining parts of his house by fire back, or last summer sometime?

A. Yes.

Q. Now, if that house were still existent, would there be a way to check the floor itself and the wood flooring to check it one way or another through sampling to test it?

A. Yes. It could be check at any time.

Q. And if you were asked to do that, how would you do it?

A. Well, I would take a, probably first grind the wood up to get it in finer form, get it in some kind of tight container. Evacuate it to get the air out of it so it wouldn't have the air problem and heat it in a furnace of some type to volatilize any thing in there which is volatile and the gases which came off that would be injected into the gas chromatograph and an electronic recorder would record all components which were in that particular fuel or that gas that came off the wood.

Q. So that you're saying here, taking the conclusions which you have given the court here as to the probabilities of these petroleum compounds through scientific tests, sampling and testing, you could determine whether or not your conclusions were positively correct?

A. Well, I hate to say positively because there is room for error in any analytic procedure but I would say the gas chromatograph which we would get from that would be fairly con sistent over a series of samples.

Q. Throughout the floor area?

A. Yes.

Q. And by proper sampling you could determine whether or not that was true of that floor area which had been exposed to

the smoke compounds or the asphalt compounds which you testified?
"A. Yes."
(Tr.28, 1.17 - Tr.31, 1.21)
"Q. Now based on your testimony and the testimony which has been recited to you and I may further add that subsequent to the fire of May 14, Mr. Burtchett, with the consent of the City of Havre Fire Department and County Fire Department, finally just simply burned down the rest of his house the later part of June, 1972. And, with that in mind, based on what you have already testified to, if that house still existed, would you be able to go in and take tests, samples of the floor and determine whether or not the flooring throughout the floor which was exposed to the asphalt compound and the soot smoke, contain components which were common to gasoline?
"A. Yes. There would be very little problem there. Take the sample and process it.
"Q. And based on your testimony which I have recited to you, in your opinion, would, if these tests had been able to have been taken, in your opinion, would components common to gasoline have shown up in your tests on the chromatograph?
"A. If they were there, they would show up.
"Q. And based on the testimony which has been recited to you, would these various components and the various soot smoke which I have recited to you and the asphalt, would a number of these components which were common to gasoline show up on the chromagraph?
"A. They could come from any of the petroleum products which had been subjected to heat."
(TR. 392, 1.20 - Tr.393, 1.17)

"MR. ETTIEN: Alright, I will go at it this way, Your Honor. There is no use hanging everything up. What, started with the highest volatile components, gasoline, will you briefly give the components which make up gasoline or naptha, which is commonly known as white gas, is that true?
"A. Well, by law, the gasoline must have a maximum or a temperature, let's put it that way, the point at which the gasoline is cut off and we go into kerosene, is about a 150° in temperature. This is to protect it as an explosive material.This includes then the components of, starting with the sixty carbon atom compounds and moving through up the ten, about a ten carbon atom compound. Now, in terms of the names, these are called hexane, heptane, octane, notane and decane, are the terms. And, in those, the way the compounds the varieties

of the compounds, well, there are three defferent hexanes. There are about seven different heptanes. In the octanes, probably -- I haven't figured it out, it's quite a little more. So, in each of those, you have a rather large number of different compounds, each having its own special boiling point and flash point and so forth.

"Q. In the compounds, as to hexane, is it the most volatile of the compounds?

"A. Hexane has a boiling point about 50° This is centigrade scale, I am speaking.

"Q. In other words, it would evaporate at 50°?

"A. Yes. It's first. That would be about 122°, if you wanted Fahrenheit.

"Q. Now, with the evidence at point one of the origin of the fire, showing that there was gasoline present at point 1 or origin 1 of the diagram and that the fire generated an extremely high temperature, what would that do as far as in your opinion and from your knowledge, as far as the hexanes were concerned?

"A. I would feel that the hexane, with its low vilatility would be the first to vaporize and burn.

"Q. And after a fire of any length of time with extremely high heat, in your opinion, would hexane be present?

"A. I wouldn't expect to find it, no."

(Tr.393, 1.26 - Tr.395, 1.7)

On cross:

"A. I don't quite understand what your overall picture here. It's a little confusing to me. First, you asked me about the no heating. Wood which had asphalt on it. Now, my problem is this: this wood was heated and the asphalt was heated and the fractured components of the asphalt would naturally be in the wood. Now, you said before heating, would there be any. After this had been heated, I can see where there would be volatile materials still in the wood which could slowly seep out of it.

"Q. But, would they vaporize to such an extent that you could take a sample with a syringe?

"A. If they were fractured to a small enough fractions, they would, yes."

(TR.398, 11.11 - 24)

CERTIFICATE OF SERVICE

I, J. Chan Ettien, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10 day of January, 1975, I mailed three (3) copies of the foregoing to Hon. Robert L. Woodahl, Attorney General, State of Montana, Helena, Montana 59601, attorney for respondent.

MORRISON, ETTIEN & BARRON

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SUPREME COURT, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

No. 74-860

In The

Supreme Court of the United States

January Term, 1975

JAMES BURTCHETT, *Petitioner,*

-vs-

THE STATE OF MONTANA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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STATE PUB. CO. HELENA, MONT.

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement of Facts	2
Reasons for Denying the Writ	3
Certificate of Service	10
APPENDIX A Excerpts of Yeager's Testimony	11
APPENDIX B Excerpts of Midkiff's Testimony	14
APPENDIX C Excerpts of Pro's Testimony	20

TABLE OF AUTHORITIES

CASES

	Page
U.S. SUPREME COURT	
Fiske v. Kansas 274 U.S. 380 (1927)	4
United States v. Marion 404 U.S. 307 (1971)	5, 6, 9
CIRCUIT COURT OF APPEALS	
United States v. Beitscher 467 F.2d 269 (10th Cir. 1972)	8
United States v. Daley 454 F.2d 505 (1st Cir. 1972)	8
United States v. Deliovane 468 F.2d 151 (7th Cir. 1972)	8
United States v. Dokow 453 F.2d 1382 (3rd Cir. 1972)	7
United States v. Edwards 458 F.2d 1061 (5th Cir. 1972)	7
United States v. Emory 468 F.2d 1017 (8th Cir. 1972)	8
United States v. Griffin 464 F.2d 1352 (9th Cir. 1972)	8
United States v. Hoatt 461 F.2d 1061 (7th Cir. 1972)	7
United States v. Ianelli 461 F.2d 483 (2d Cir. 1972)	7
United States v. Lee 458 F.2d 32 (9th Cir. 1972)	8
United States v. Merrick 464 F.2d 1087 (10th Cir. 1972)	8, 9
United States v. Stein 456 F.2d 844 (2d Cir. 1972)	7
United States v. White 470 F.2d 170 (7th Cir. 1972)	8

TABLE OF AUTHORITIES (Continued)

STATUTES

	Page
U.S. SUPREME COURT RULES	
U.S. Sup. CT Rule 19, 28 U.S.C.A.	5, 6

TEXTUAL

14 C.J.S., Certiorari §172 b(1) (1939)	4
14 C.J.S., Certiorari §12 (1939)	5

No.

In The

Supreme Court of the United States

January Term, 1975

JAMES BURTCHETT, *Petitioner,*

-vs-

THE STATE OF MONTANA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

STATEMENT OF FACTS

Yeager, a chemist at Northern Montana College, testified for the defendant. The substance of his testimony was that he could heat samples of unburned flooring impregnated with the asphalt base or smoke from the burner used to thaw pipes and determine by gas chromatography if the elements common to gasoline were present in the impregnated flooring. Excerpts from the transcript indicating Yeager's qualifications and his method are contained in Appendix A.

The deputy state fire marshall sent samples of burned flooring from defendant's house to the Alcohol, Tobacco and Firearms Laboratory of the U.S. Department of Treasury. Midkiff, chemist for that laboratory, conducted tests on those samples and determined that gasoline had been present in the burned area by means of a form of gas chromatography which does not involve heating the material to be tested. He testified that this method is widely accepted in the professional community of forensic chemists in the arson field and is very accurate. However, this method cannot be used to detect the presence of volatile petroleum distillate such as gasoline in material which has been stored in the open for several months. He further testified that in fact there is no reliable scientific means of detecting such volatile petroleum distillates after such a time period has elapsed and that Yeager's testimony that the same results could be obtained by the heating method was incorrect and had resulted from Yeager's lack of familiarity with Midkiff's method. Pertinent excerpts from Midkiff's testimony, including his qualifications, are set out in Appendix B.

The state's expert Pro testified that the presence or absence of asphalt, linoleum, and soot—including soot from traces of gasoline in the burner used to thaw the pipes—on the flooring would not have affected Midkiff's test. Excerpts from Pro's testimony are contained in Appendix C.

ARGUMENT

I.

THE REMEDY OF CERTIORARI IS INADEQUATE BECAUSE NO HOLDING BENEFICIAL TO PETITIONER WOULD RESULT FROM THIS COURT GRANTING THE WRIT.

Petitioner's allegation of prejudice arises from the fact that he was not able to provide unburned flooring for Yeager his chemist to examine. Petitioner hoped that Yeager's testimony would show that the same elements which Midkiff found in the burned flooring were present in the unburned flooring. Thereby petitioner hoped to imply that the elements upon which Midkiff relied to reach his conclusion that gasoline was present could actually have come from the adhesives and soot in the flooring.

However, both Midkiff and Pro testified that the presence or absence of the soot and adhesives would not have affected the results of Midkiff's tests. The only means by which Midkiff's test could be impeached was a similar test in which heating was not used. By the time a charge could have been filed against petitioner, that test would not have been useful in showing that gasoline had been present in the unburned flooring because any gasoline that was present at the time of the fire would have evaporated. And, as the Montana Supreme Court pointed out, the sample which Midkiff used was still intact and available to the defendants should they wish to dispute Midkiff's basic finding that gasoline was present in the sample of the burned flooring.

In other words, of all the substances alleged to have been present in petitioner's flooring, only gasoline or white gas evaporates at room temperature. Midkiff's experiment was conducted at room temperature and elements found in gasoline were detected in the air surrounding the flooring samples. From this he concluded that gasoline or white gas was present in the sample flooring. Defend-

ant's expert intended to cast doubt on Midkiff's testimony by showing that elements common to gasoline were present in unburned segments of the flooring. However, Midkiff's conclusion was based not solely on the presence of these elements, but rather their presence in the air at room temperature. Thus, Yeager could not discredit Midkiff's test by means of a test in which heat is used.

The Montana District Court accepted Midkiff's and Pro's testimony to the effect that the defendant would not be able to impeach Midkiff's test using a heat test. The Montana Supreme Court affirmed that finding.

Review on certiorari is a matter of sound judicial discretion and a general rule for the exercise of that discretion is:

> Where no jurisdictional fact is in dispute, the review on certiorari, as a general rule, does not extend to the consideration of the probative force of conflicting testimony, and, therefore, where there is some evidence, the weight and sufficiency thereof as to the facts on which the determination below was based, ordinarily will not be considered. 14 C.J.S., Certiorari §172 b.(1) (1939).

Out of this rule two exceptions have been engrafted. This court "will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts." *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927).

In the present case there is ample evidence supporting the Montana District and Supreme Court's finding of no actual prejudice. See Appendices B and C. In addition, it is not necessary to analyze the facts to pass upon the federal question in the present case. The Montana courts' conclusion of law, that a showing of either actual prejudice or intentional delay violates defendants Fifth

Amendment rights, is not intermingled with the finding that there existed neither of these factors as a result of the state's delay.

Furthermore, the Montana Supreme Court here interpreted *United States v. Marion*, 404 U.S. 307 (1971) to hold that a demonstration of either actual prejudice or intentional delay on the part of the state will necessitate dismissal of the prosecution. This is the interpretation most favorable to the defendant. Consequently, in requesting this court to grant certiorari and hold for the defendant thereafter, petitioner is requesting this court to review the factual findings of the Montana courts.

However, where neither of the criteria of *Fiske* are met, this Court will accept the Montana courts' findings of fact. As to the interpretation of the *Marion* case, the most that could be expected from this court would be an interpretation of *Marion* similar to that which the Montana Supreme Court has already made. Consequently, no beneficial result for petitioner will come from the granting of certiorari in this case. A general rule in the exercise of discretion is that "the writ of certiorari will not be granted where the remedy afforded will be inadequate or where no beneficial result will follow." 14 C.J.S., Certiorari, §12 (1939). Because no result beneficial to defendant will follow, the writ should not be granted.

II.

THE MONTANA SUPREME COURT CORRECTLY INTERPRETED THE *MARION* DECISION IN THE PRESENT CASE.

Petitioner contends that this court should grant his petition because of alleged confusion among the circuits as to the ruling in *Marion*. Presumably his authority for this proposition arises from section 1(b) of Rule 19 of the Supreme Court Rules which states that a factor to be considered governing review of certiorari is "(w)here a court of appeals has rendered a decision in conflict with the

decision of another court of appeals on the same matter." Even if we assume arguendo that the courts of appeals have issued conflicting opinions on the scope of *Marion*, this is not grounds for this court to issue a writ of certiorari because Section 1(b) is intended to apply to courts of appeals decisions and not to state court decisions.

The criteria for issuance of writs from state court decisions is found in section 1(a) of Rule 19 which sets out as a criteria "(w)here a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court." Petitioner herein must rely upon the second part of section 1(a) and contend that the Montana Supreme Court has incorrectly interpreted the *Marion* decision. Defendant in so contending quotes this court as follows:

> We need not and could not now determine when and in what circumstances actual prejudice requires the dismissal of prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution . . . (T)he rights of defendant to a fair trial will necessarily involve delicate judgment based on the circumstances of each case. 404 U.S. at 324-325.
>
> No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. 404 U.S. at 326.

In his concurring opinion Justice Douglas stated that the courts must avoid "today's mechanical approach to the application of basic constitutional guarantees." *Marion*, *supra* at 333.

The message of this court in the *Marion* case is clear. Although the Justices disagree as to the Constitutional basis for their decision, they do agree that there can be

no set formula for determining when delay in instituting prosecution should lead to dismissal of the prosecution. They also agree that certain criteria among others should be used: actual prejudice to the defendant, intentional delay on the part of the state, and the possibility that the defendant cannot have a fair trial. This Court intends that the lower courts should use these criteria on a case by case basis to determine whether particular prosecution should be dismissed. This is exactly what the Montana Supreme Court did in deciding the present case. It's final decision was that because there was neither evidence that the state's delay in instituting prosecution prohibited the defendant from introducing evidence which would have aided him in his defense nor an allegation of intentional delay on the part of the state, the prosecution need not be dismissed. The Montana Supreme Court was correct in its interpreta on of the *Marion* case and this court should not grant certiorari for that reason.

III.

THERE IS NO GENUINE CONFLICT BETWEEN THE COURTS OF APPEALS AS TO THE INTERPRETATION OF THE *MARION* CASE.

Although the dicta of various opinions indicate that the courts are not certain whether only actual prejudice or actual prejudice and intentional delay require dismissal of prosecution, there is no conflict between the rulings of any of the Courts of Appeals cases cited by petitioner. In all but two of these cases cited by petitioner in the portion of his brief dealing with the confusion among the circuits, the court found that the evidence did not merit dismissal of the prosecution and in so holding found that the defendant had failed to demonstrate even the requisite prejudice. See *United States v. Stein*, 456 F.2d 844, 849 (2d Cir. 1972); *United States v. Iannelli*, 461 F.2d 483, 485 (2d Cir. 1972); *United States v. Dukow*, 453 F.2d 1328, 1331 (3d Cir. 1972); *United States v. Edwards*, 458 F.2d 875, 882 (5th Cir. 1972); *United States v. Hoatt*, 461 F.2d

1061, 1066 (7th Cir. 1972); *United States v. White*, 470 F.2d 170, 175 (7th Cir. 1972); *United States v. Emory*, 468 F.2d 1017, 1020 (8th Cir. 1972); *United States v. Griffin*, 464 F.2d 1352, 1355 (9th Cir. 1972); *United States v. Delicante*, 468 F.2d 151, 157 (7th Cir. 1972); *United States v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972); *United States v. Merrick*, 464 F.2d 1087, 1091 (10th Cir. 1972).

In the remaining two cases, both of which defendant cites for the proposition that some courts require a showing of both prejudice and intentional delay, and which contain language to that effect, there exist factors which reduce the effect of that language so as to render it dicta. The *Lee* case is a per curiam opinion, which petitioner quite properly notes. *United States v. Lee*, 458 F.2d 32 (9th Cir. 1972). In that case the Court of Appeals so merely stated:

> Appellent was tried only two months after he became an "accused," and there is nothing to indicate that the pre-indictment delay was purposeful and that appellent suffered substantial prejudice from the delay. *Lee*, *supra* at 33.

The implication from the brevity and per curiam nature of the opinion is that the defendant's contentions were so devoid of merit that it was not necessary to reach the question of whether actual prejudice only is enough to merit dismissal of the action or whether intentional delay is also required.

The *Beitscher* case is distinguishable from the present case in that the defendant contended:

> . . . that the delay was inherently prejudicial, constituting a denial of their Fifth and Sixth Amendment rights to due process and to a speedy trial. *United States v. Beitscher*, 467 F.2d 269, 272. (10th Cir. 1972).

Because the defendant presented no evidence of prejudice, the *Beitscher* court was never forced to face the issue of whether actual prejudice alone or actual prejudice and intentional delay requires the dismissal of the prose-

cution. As did the court in *Lee*, *Beilscher* court merely paraphrased the language from this Court's decision in *Marion* which can be construed to require both actual prejudice and intentional delay.

Consequently, in no case presented to the Courts of Appeals has the defendant been able to show actual prejudice. It appears that the courts are proceeding to use the *Marion* decision as a guideline and decide each case on its own particular facts, as did the Montana Supreme Court.

An example is the language of the Tenth Circuit Court, which, in holding that the prosecution need not be dismissed stated: "We are convinced that defendant had a fair trial and was deprived of no Fifth or Sixth Amendment rights." *Merrick*, *supra* at 1091. It is therefore unnecessary for this court to intercede at this time.

IV.

IT IS NOT NECESSARY FOR THIS COURT TO REPORT A RECORD FACTUAL SITUATION TO INTERPRET THE MARION DECISION.

Finally, defendant contends that this court has not yet reported a record factual situation for the purpose of determining whether or not such situations occurring during pre-information delay is prejudicial to defendants defense. Nevertheless, defendant has cited no less than 13 cases in which fact situations have been presented and decided upon by Courts of Appeals. In addition this court has pointed out that with regard to pre-indictment delay "the rights of defendant to a fair trial will necessarily involve the delicate judgment based on the circumstances of each case." *Marion*, supra, at 325. Thus, so long as the general guidelines of the *Marion* case are followed so that the defendant receives a fair trial no record factual situation by this court is needed. In fact, such a case might result in strict adherence to set rules which might not apply in every case. This court should not intervene until it

appears that further elaboration on the *Marion* case is necessary to prevent prejudice to defendants' rights to a fair trial. At the present time, it appears the lower courts are preserving those rights adequately using the guidelines set out in the *Marion* decision.

CERTIFICATE OF SERVICE

I, Robert L. Woodahl, Attorney General of Montana, attorney for respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 13th day of February, 1975, served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on petitioner by mailing said copies in a duly addressed envelope, with first class postage prepaid, to J. Chan Ettien, Attorney at Law, 339 Third Street, P.O. Box 1070, Havre, Montana 59501.

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APPENDIX A

EXCERPTS FROM YEAGER'S TESTIMONY

The testimony of Yeager as to his qualifications follows:

"Q. And what is your occupation?

A. I am a professor at the college.

Q. And what is your specialty at the college?

A. Chemistry.

Q. And do you teach chemistry at the college?

A. Yes.

Q. You are an instructor there?

A. Yes.

Q. And what are your degrees in chemistry?

A. I have a Bachelor of Arts and a Master of Arts.

Q. And that's in chemistry?

A. Yes.

Q. Now, how long have you been an instructor in chemistry?

A. Well, my first full teaching position started in 1936 but previously to that when I was an undergraduate, I did teaching at the same time.

Q. And prior to your teaching at the college, where did you teach?

A. I taught in several Montana high schools, Hingham, Great Falls, out in Washington one year.

Q. How long ago have you been ap at Hingham?

A. Nine years ago.

Q. You taught chemistry there?

A. Yes.

Q. In your teaching of chemistry classes, is that general organic chemistry?

A. Mostly organic. I also teach the introductory courses.

Q. And in the course of your teaching duties, does that take in both instruction through textbook and experimental work in labs?

A. Yes.

Q. In chemistry labs?

A. Yes.

Q. You have done that over the years through your teaching career?

A. Yes.

Q. And during your teaching career, have you become familiar with the various different derivatives of petroleums which make up gasoline, diesel fuel, stove fuel, distillates and that type of petroliphus substance?

A. Yes, I have.

Q. And have you devoted any extra time in the course of your career to the study of hydrocarbons?

A. Yes. I have always been quite interested in the refining process and petroleum. I have studied especially on that.

Q. Sort of a hobby with you?

A. Sort of a sideline."

(Tr.385, L.19 - Tr.387, L.07)

The testimony of Yeager concerning his method of detecting the elements of gasoline follows:

"Q. Now, you have been advised, have you not, that Mr. Burtchett destroyed the remaining parts of his house by fire back, or last summer sometime?

A. Yes.

Q. Now, if that house were still here available and that flooring was still existent, would there be a way to check the floor itself and the wood flooring to check it one way or another through sampling to test it?

A. Yes. It could be checked at any time.

Q. And if you were asked to do that, how would you do it?

A. Well, I would take a, probably first grind the wood up to get it in finer form, get it in some kind of tight container. Evacuate it to get the air out of it so it wouldn't have the air problem and heat it in a furnace of some type to volatilize anything in there which is volatile and the gases which came off that would be injected into the gas chromatograph and an electronic recorder would record all components which were in that particular fuel or that gas that came off the wood.

Q. So that you're saying here, taking the conclusions which you have given the Court here as to the probabilities of these petroleum compounds through scientific tests, sampling and testing, you could determine whether or not your conclusions were positively correct?

A. Well, I hate to say positively because there is room for error in any analytic procedure but I would say the gas chromatograph which we would get from that would be fairly consistent over a series of samples.

Q. Throughout the floor area?

A. Yes."

(Tr.30, l.15 - Tr.31, l.21)

"Q. Now, based on your testimony and the testimony which has been recited to you and I may further add that subsequent to the fire of May 14, Mr. Burtchett, with the consent of the City of Havre Fire Department and County Fire Department, finally just simply burned down the rest of his house the latter part of June, 1972. And, with that in mind, based on what you have already testified to, if that house still existed, would you be able to go in and take tests, samples of the floor and determine whether or not the flooring throughout the floor which was exposed to the asphalt compound and the soot smoke, contain components which were common to gasoline?

A. Yes. There would be very little problem there. Take the sample and process it.

Q. And based on the testimony which I have recited to you, in your opinion, would, if these tests had been able to have been taken, in your opinion, would

components common to gasoline have shown up in your tests on the chromatograph?

A. If they were there, they would show up.

Q. And based on the testimony which has been recited to you, would these various components and the various soot smoke which I have recited to you and the asphalt, would a number of these components which were common to gasoline show up on the chromatograph?

A. They could come from any of the petroleum products which had been subjected to heat?"

(Tr.392, l.29 - Tr.393, l.17)

APPENDIX B

EXCERPTS FROM MIDKIFF'S TESTIMONY

The testimony of Midkiff as to his qualifications follows:

"Q. And what is your occupation?

A. I am a forensic chemist with the Bureau of Alcohol, Tobacco and Firearms, U.S. Treasury Department.

Q. And what is your educational background?

A. I have a Bachelor's and Masters degree in chemistry from the George Washington University. I am presently enrolled from another program leading towards a Masters degree in Forensic Science, also, at the George Washington University.

Q. And did you have any background as a chemistry instructor?

A. Yes. I have served for the alternate years, for the past six years as an instructor in chemistry at the George Washington University.

Q. And could you tell us something about your work experience as a chemist?

A. Upon receiving my bachelors degree I was employed as a research chemist by the Arthur W. Sloan foundation in Virginia, in Alexandria, Virginia. I was employed by the Atlantic Research Corporation. By

Malpar, Incorporated at the Space Flight Center in Greenville, Maryland. By Vito Engineering Company at the Godard Space Center in Greenville, Maryland. By Marieta Corporation in Baltimore, Maryland. Now, with the U.S. Treasury Department.

Q. Could you explain just briefly what kind of work you did with those companies?

A. I was, in most of these areas, most of the earlier employment, I was employed as a research chemist. Primarily, analytical chemist and analyzing the number of different materials, which range from minerals to contaminants in space cabin atmospheres. Propellants, explosives. This type of material. At Marieta Corporation, I was supervisor of the analytical seminary for their lab corporation.

Q. When did you join the crime lab with the Alcohol, Tobacco and Firearms?

A. I came there in March, of 1971.

Q. And what is your position there?

A. I am a forensic chemist.

Q. And have you ever had occasion to publish any works, scientific nature?

A. Yes. I have seven or eight publications dealing with a number of aspects of chemistry.

A. And have you ever published on this subject of gas chromatography as it relates to accelerant material used in arson cases?

A. Yes, I have. There was an article which appeared in the journal of the association of official and political chemists.

MR. ETTIEN: If it please the Court, we will recognize Mr. Midkiff's qualifications.

Q. Have you ever in your work in this laboratory you are now employed by, had occasion to perform any analysis on arson cases?

A. Yes, I have.

Q. And approximately how many?

A. In 1970 or 1972, I worked on approximately four hun-

dred and thirty (430) cases involving arson and fire bombs.

Q. And in any of these arson cases did you have occasion to do any analysis on any tile or linoleum products?

A. Yes. I would estimate that approximately one sample in ten submitted to our laboratory involves some samples taken, tile or linoleum flooring type materials."

(Tr.78, l.20 - Tr.80, l.24)

The testimony of Midkiff as to the method used by the Alcohol, Tobacco and Firearms Laboratory follows:

"A. Yes, Your Honor. The method of examination used was to take a small syringe, hypodermic needle and insert it through the lid of the can and remove a sample of the air in the can. If a flammable liquid is present or, volatile liquid is present among the components in the can, it will also be present in the vapor in the can itself, in the rubbish, becomes mixed with the air in the can. This sample is injected into the gas chromatograph and a chart pattern is obtained to identify the particular material. The chart pattern obtained from the instrument is compared with that of known materials and one is able to identify the material as first, a volatile liquid is present in the sample and to identify the type of volatile liquid which was present.

(Tr.220, l.13 l.27)

"Q. Is your—does your laboratory perform many such types of analysis and investigations in arson cases?

A. Yes, we do.

Q. And how many have you performed, personally?

A. Last year, 1972, I examined evidence submitted in connection with approximately four hundred and thirty (430) arson and fire bomb cases.

Q. Is this method gas chromatography, is this a widely accepted method?

A. Yes, it is.

Q. And in your professional community?

A. Yes, it is.

Q. And is it an accurate method?

A. Yes. It is a very accurate method.

Q. In your analysis of these specimens, did you have to heat the specimens?

A. No. I did not."

(Tr.224, l.15 - Tr.225, l.01)

Q. Okay. Another little hypothetical — say there was three or four months lapse in time since the smoke permeation of wood with, say with a volatile petroleum distillate, and if you were to analyze this with or let me ask it this way: can you tell me of any technique that you might use to allow you to reliably find and identify the nature of the flammable liquid used?

A. If a sample has been, shall we say, stored in the open — in other words, not in a sealed container, based upon our experience and my familiarity with the techniques, I know of no reliable technique to detect and identify a volatile petroleum distillate after a period of say, several months has elapsed.

Q. Have you ever had occasion to experiment along this line?

A. Yes. We have performed some experiments in our laboratory involving again, a very similar situation. Just merely placing a sample of small amount of gasoline on a piece of wood and just allowing it to just gradually evaporate. This material just gradually disappears and after a period of a week or more, the amount of vapor is very small and essentially impossible to detect.

Q. Would you say after two weeks you could detect anything?

A. I believe, if I recall the experiment, after two weeks, I don't believe we were able to detect any appreciable vapor using our technique.

Q. Now, referring back to this affidavit that you have acknowledge that you read, by Francis Mayer, if suf-

ficient smoking conditions did exist, in your opinion, would this deposit a significant amount of petroleum anywhere?

A. I would not anticipate any appreciable quantity of material would be deposited. The material, the oils and so forth are not particularly volatile and while certainly, you would get some soot deposit and certainly some unburned material, I would not anticipate any situation wherein normal circumstances, you would deposit an appreciable amount of your oil or petroleum distillate.

Q. And you have read the affidavit and you have seen it. How many times he indicated he used this device and he indicated where the smoke went throughout the basement area?

A. Yes, I have.

Q. Now, this evidently covers quite a few square feet and knowing this, would you still make the same statement?

A. Yes, I would.

Q. Okay. Another hypothetical. Assume that in June of 1971, now, this is the time, is it not, that you performed the analysis upon the specimens in this case?

A. Yes, it is.

Q. Assume that you were to perform an analysis on the permeated wood, if it were permeated and the asphalt backed linoleum found in the area of the Defendant's home that were not burned, that with samples you analyzed, from burned holes in the floor, assume that you analyzed different parts of the floor that weren't burned by use of gas chromatography. Would the test give you the same chromtograms as you got in the analysis that Mr. Habeger sent?

A. No. They would not.

Q. And why not?

A. Again, the low nature, the low volatility of any of these heavier petroleum distillates, fuel oil, kerosene type and the very low volatility of materials like asphalt simply do not give you sufficient vapor to detect and analyze by the techniques we are using."

(Tr.87, L.10 - Tr.89, L.21)

"Q. Going back to the affidavit by Professor Yeager at the Northern Montana College, you stated your familiarity with it?

A. Yes.

Q. Would you turn to the second page of the affidavit and read out loud the first paragraph of his conclusion?

A. "Based on his knowledge and experience, affiant is of the opinion that the gasoline components described in said laboratory report could also have resulted from the things described in the affidavit of Francis Mayer".

Q. Do you agree with the conclusion?

A. No. I do not.

Q. Why don't you?

A. I think probably that the gentleman was not really thoroughly familiar with the technique we are using and really, how we go about making the examination. In other parts of his affidavit, he indicates that he could heat these materials and so forth and I have no dispute whatever, you know, with what he is saying, but I think he wasn't thoroughly familiar with the technique we are using which does not involve the heating of these materials. It does not involve any extraction of these materials and so our technique is really not suitable to picking up anything that does not have any appreciable volatility. The other things that may have mislead him somewhat is the wording of our report. Our laboratory report. I indicated in my laboratory report that benzine, hexane, toluene, and xylene were termed among the components of the vapor. That's true, but these were not the only components in the chromatogram. They were merely ones I identified. This is a standard mixture I use for the identification of the components. These were not the only components present. He, of course, did not have the opportunity to see our chromatograms and compare them with a chromatogram of gasoline or naptha. This would be the reason I did not agree with his conclusion. He was not really familiar with our technique.

Q. The things that Professor Yeager and Francis Mayer referred to, in their affidavits, would you say they are volatile or nonvolatile?

A. If the things, the asphalt linoleum material and this kerosene material type fuels, they are nonvolatile fuels.

Q. And what you identified were volatile?

A. Very volatile."

(Tr.90, 1.09 - Tr.91, 1.27)

APPENDIX C

EXCERPTS OF PRO'S TESTIMONY

The testimony of Pro as to his qualification follows:

"Q. And what is your occupation?

A. I am a chemist.

Q. Who do you work for?

A. I work for the U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms.

Q. Is that what you would call a crime laboratory?

A. It's the scientific service division. The crime laboratory is a branch in that division.

Q. I see. And, would you state to the Court and the jury some of your educational background as far as chemistry is concerned?

A. Yes. My undergraduate work was at NYU. My graduate work was at Columbia. Following school work, about 1941, I went to work for National Lead Research Laboratories. From there I went into the army. Upon release from the army, I worked for the Manhattan Project and about 1949 I went to work for the Treasury Department.

Q. What degrees do you hold in chemistry, if any?

A. Bachelors and Masters.

Q. Bachelors and Masters. In the course of your scientific work, have you ever had occasion to publish

any works in any of the scientific works in any of the scientific journals?

A. Yes. While I was at the Treasury Department I published, to date, sixty-three articles and I have contributed a number of chapters to five textbooks in the various fields of chemistry.

Q. In June of 1971, what position did you hold in the laboratory in Washington, D.C.?

A. At that time I was chief of the forensic branch.

Q. And is it true that at that time Charles Midkiff, who previously gave testimony in this case, was under your supervision?

A. Yes, sir.

Q. And have you personally ever done any laboratory investigation in arson cases?

A. Yes. Efforts in this area were started about four years ago and this was in connection with the Federal Government's aid to State and local governments in the area of fire bombs, bombings, guns and as a result of this bill, we went into the arson work in this department and this is primarily because of the fire bomb situation which covered all types of arsons, bombings.

Q. Did your duties in June of 1971, at the forensic lab include the supervision of analysis in arson cases and material suspected in arson cases?

A. Yes. All the work that was carried out was under my supervision."

(Tr.402, 1.17 - Tr.404, 1.05)

On cross-examination:

"A. Well—

MR. ETTIEN: Your Honor, may I voir dire, just a moment? I want to establish whether or not he is qualified. He hasn't at this point, he hasn't, he hasn't testified he is experienced on a chromatograph. I don't want to make the State's case but there is no—

THE COURT: Your objection is on lack of foundation. I think that you might explore that a bit more. Sustain the objection.

Q. Have you ever had occasion, personally, to operate a gas chromatography machine?

A. I would like to point out, I might answer you indirectly.

MR. ETTIEN: Just a moment. I am going to object.

A. Alright. I have, yes. I have.

MR. ETTIEN: I understand, Mr. Pro. I am not trying to louse this up. That is not responsive to the question.

THE COURT: Very well. He has answered yes, I believe.

Q. Would you explain your use of the machine?

A. I bought the first machine in the Bureau. I was one of the pioneers in this work and I now have fourteen machines in my department and a number of these machines in our field laboratories. And, I have sponsored this type of forensic application that is gas chromatography and scientific crime detection. This came under my supervision. Basically our forensic branch was the old research and development. We just grew into a large forensic area which now has been severed and a new research and development branch set up but these machines are well known to me.

Q. Are you familiar then with the results one would get, the machines, the chromatograph?

A. Yes."

(Tr.406, L.13 - Tr.407, L.20)

The testimony of Pro as to the effect of the asphalt and soot on Midkiff's test follows:

"Q. Mr. Pro, I am going to ask you some hypothetical questions. They may be a little involved because I have to relate some of the testimony and evidence that has been introduced in this case. There has been testimony given by Francis "Buzz" Mayer in this case on, that on various occasions he went to the basement of the Defendant's home to thaw pipes that had been frozen by the weather and to thaw

the pipes, he used a small sort of little tank heater with a chimney and a wick and I think it has been described as an old fashioned kerosene heater. Are you familiar with that type apparatus?

A. Yes.

Q. There has been testimony that what was burned in that apparatus on the occasions he operated it was kerosene, maybe diesel fuel, something of that nature. And he testified that once he did not operate the machine but he smelled it and thought he smelled that gasoline had been in there, and at any rate, when operating this device, he testified that the draft in the basement of the building here that you see a diagram, caused smoke to whirl around. He said black, sooty smoke caused by inefficient burning of the kerosene and diesel fuels in the apparatus and he also testified there was some testimony, I should say, that the type of linoleum that was on the floor, main floor of the house seemed to be the type that had a petroleum base. Now, if we were to take samples from that floor that hadn't been burned, just the smoke permeated wood and we were to take some of the asphalt based linoleum, and we were to put in a container such as this and were to seal it and without heating it, at room temperature, insert a syringe and draw the vapors out, and we were to insert that vapor or sample into a gas chromatography machine, by the way, you testified that you are familiar with that device?

A. Yes.

Q. We were to insert that type of sample into a gas chromatography machine, what type of chromatograph would you get?

A. Well—

MR. ETTIEN: Your Honor, may I voir dire, just a moment? . . ."

(Tr.405, 1.03 - Tr.406, 1.15)

MR. ALTMAN: Now, let's go back to the question that we were trying to get answered. You recall that I asked you—described the wooden floor that possibly had been permeated with smoke from this

inefficient burning apparatus and inside the apparatus were kerosene and possibly diesel fuel and then we had a petroleum based linoleum. If you were to take samples of that smoke permeated wood and, were to take particles or pieces of the asphalt based linoleum and put it in a coffee container such as I have here and put a lid on it and seal it and inject through the plastic lid a hypodermic syringe and withdraw an air sample from inside, now, this is all without heating the contents or the can, normal room temperature, take that air sample that you would withdraw and inject it into a gas chromatography machine, what would you get from this?

A. Well—

Q. On your machine?

A. Well, from soot on wood and linoleum and whatever other materials you may have deposited from the burning, results from combustion, you would get, in all probability, just a straight line. You wouldn't get any volatile materials because first of all, linoleum is not volatile. By that, I mean it doesn't evaporate like gasoline because if it did, in six months you wouldn't have any linoleum. It would be evaporated. It's just not the nature of the product. If your wood had soot on it, soot does not evaporate. You just wouldn't get anything. The whole principle behind gas chromatography is measuring something that is volatile. Something that evaporates from the bulk of the material that is laid down. Now, gasoline is another thing. If you place gasoline in a can, much of that gasoline is in a vapor state or goes into equilibrium with the liquid. So, the liquid and the gases are in equilibrium within that can as far as it can't escape from that can. A certain percentage of that gas goes into the gas phase and that is what you siphon out and of course, you get a gasoline chromatogram.

Q. If we were to take the situation as it does exist, the Fire Marshal removed samples from an area of the Defendants floor that had been burned, a hole was burned in the floor. He cut samples of the burned in the floor. He cut samples of the burned charred wood. He put it in this container and he sealed it. And he sent it to your laboratory and if you were to receive this and once again stick a hypodermic needle in there

and withdraw let me go back. My hypothetical. If the burned area of the floor, it wouldn't be saturated with gasoline or a volatile, if you were to put your hypodermic needle in there and withdraw an air sample and inject that into your gas chromatography machine, what would you get?

A. You would get a resultant chromatogram which would be, that of gasoline. Now, the very function of the machine.

MR. ETTIEN: Just a moment. The witness has answered."

(Tr.410, l.25 - Tr.412, l.23)